United Nations

AT

Administrative Tribunal

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ADMINISTRATIVE TRIBUNAL

Judgement No. 914

Case No. 1022: GORDON
PELANNE

Against: The Secretary-General
of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Hubert Thierry, President; Mr. Julio Barboza, Vice-President; Mr. Kevin Haugh;

Whereas at the request of Joan Gordon, a staff member of the United Nations, and Pierre Pelanne, a former staff member of the United Nations, the President of the Tribunal, with the agreement of the Respondent, extended until 31 July 1998 the time-limit for the filing of an application with the Tribunal;

Whereas, on 10 June 1998, the Applicants filed an application requesting the Tribunal:

"...

7. ... to determine that:

...

(ii) The amount of compensation granted to the Applicants was grossly disproportionate with the gravity and seriousness of the irregularities committed in [the Department of Administration and Management] in disregard of its responsibility for 'establishing administrative policies, procedures and machinery for the efficient and effective functioning of the internal justice system' in the Organization.

(iii) The amount of compensation was also inadequate in view of the far-reaching consequences of the irregularities committed by the Respondent; irregularities which cannot be corrected otherwise.

...

8. [and to order] the Respondent to grant them compensation and damages equivalent to **three years net base salary, in addition to the two months** which the Respondent has agreed to pay them on the recommendation of the Joint Appeals Board ..."

Whereas the Respondent filed his answer on 10 February 1999;

Whereas the Applicants filed written observations on 31 March 1999;

Whereas the facts in the case are as follows:

The Applicant Gordon entered the service of the United Nations on 12 January 1976, on a one-year fixed-term contract as Alternate Secretary, Joint Appeals Board (JAB) and Joint Disciplinary Committee, at the P-3 level. Her appointment was successively extended until 1 June 1979, when she received a probationary appointment. On 1 February 1980, the Applicant Gordon received a permanent appointment; on 1 February 1982, she was promoted to the post of Secretary, JAB, at the P-4 level; and she was promoted to the P-5 level with effect from 1 April 1987. On 1 October 1990, she became the Chief of Administrative Review Unit, Office of Human Resources Management (OHRM), Department of Administration and Management.

The Applicant Pelanne entered the service of the United Nations on 1 February 1970, on a probationary appointment, as an Associate Programme Management Officer at the P-2 level, in the Department of Economic and Social Affairs, Office of Technical Cooperation. On 1 February 1972, his appointment was converted to permanent. On 1 April 1973, the Applicant Pelanne was promoted to the P-3 level. On 4 September 1974, he transferred to the post of Administrative Officer, Training Service, Division of Personnel. He was promoted to

the P-4 and P-5 levels on 1 April 1976 and 1 April 1981, respectively. On 1 May 1982, he became Deputy Chief of the Training and Examinations Service, Division of Personnel Administration, and his functional title changed to Chief of Section on 7 December 1987. On 31 March 1999, the Applicant separated from service upon retirement.

In a memorandum dated 5 March 1996, entitled "Implementation of General Assembly resolutions on the programme budget for the biennium 1996-1997; and Actions required by the Efficiency Board", the Assistant Secretary-General for Human Resources Management, proposed to the Under-Secretary-General for Administration and Management, inter alia, "a revised organizational structure for OHRM."

On 6 March 1996, the Chief of Staff, Executive Office of the Secretary-General, informed the Chairperson, Appointment and Promotion Board, inter alia, as follows:

> "As part of additional restructuring within OHRM to respond to the need for better implementation of the Secretary-General's human resources management strategy and to reflect functional changes and efficiency needs which are required for implementation of the 1996/7 budget, and with the full agreement of the Assistant Secretary-General for Human Resources Management, the Secretary-General has decided to appoint the following staff at the D-1 level:
>
> > [Ms. X] as Deputy Director, Staff Development and Performance, Policy and Specialist Services Division and Chief, Training and Career Management Service;
> >
> > [Ms. Y] as Chief, Common System and Organizational Policies and Litigation Service;
> >
> > ...
>
> I would be grateful if these appointments could be brought to the attention of the members of the Appointment and Promotion Board."

In a memorandum dated 22 March 1996, the Assistant Secretary-General for Human Resources Management announced to all Heads of Departments and Offices, inter alia, that

with effect from 25 March 1996, Ms. X had been appointed Deputy Director of the Specialist Services Division and Chief, Staff Development Services, and that Ms. Y had been appointed to the post of Chief, Common System and Specialist Services.

On 20 May and 21 May 1996, respectively, the Applicants requested the Secretary-General to review the administrative decision to assign two staff members, one at the P-5 level, and one at the D-1 level from outside the Department, to the only two D-1 level posts in the Specialist Services Division without first circulating vacancy announcements for them. Not having received a reply within the applicable time limits, the Applicant Pelanne lodged an appeal with the JAB on 17 July 1996, and the Applicant Gordon lodged an appeal with the JAB on 19 July 1996.

The JAB adopted its report on 16 October 1997. Its considerations and recommendation read as follows:

> "69. The Panel first considered the question of the circulation of vacancy announcements for the above mentioned D-1 posts. In that respect, the Panel observed that in a number of resolutions the General Assembly had directed that the Administration should announce 'all existing vacancies' (resolution 33/143, para. I, para.1(a)), and further required that 'Vacancy announcements for all posts shall be issued without delay as soon as vacancies are known' (resolution 35/210, Annex, para. 12). ...
>
> 70. The Panel observed that the Representative of the Secretary-General contended that the two D-1 posts had to be filled on an urgent basis to meet the exigencies of the service resulting from the recent restructuring, and that 'OHRM simply could not afford the unavoidable delay of 4 to 6 months that would have resulted from announcing these two vacancies'. In that respect, the Panel noted that the Administrative Tribunal had expressed the view, in its Judgement No. 362, Williamson, that a waiver of the vacancy announcement 'might be justified in the light of the responsibilities of the Organization under the Charter in an extraordinary emergency situation, for example, a peacekeeping or natural disaster relief operation.' The Panel did not consider that the decision to proceed with the restructuring referred to in the reply of the Representative of the Secretary-General to the appeals created 'an extraordinary emergency situation' within the meaning of the above mentioned judgement, and therefore justified the non-distribution of vacancy announcements as mandated by ST/AI/390.

71. The Panel then observed that the Appellants had complained that they had not been fully and fairly considered for either D-1 position. It further observed that the Representative of the Secretary-General had contended that the ASG/OHRM was familiar with the qualifications, merit and experience of all his senior staff at the P-5 level and above and that 'having considered all P-5 candidates in OHRM, [the ASG had concluded that] none possessed the wide experience and skills obtained by [the preferred candidates] in a number of varied assignments.' In other words, the Representative of the Secretary-General, while recognizing that 'the procedures set out in ST/AI/390 ... had not been followed', implied that the Appellants had been duly and fully considered for the posts referred to above. In that respect, the Panel noted that, in its Judgement No. 362, Williamson, the Administrative Tribunal had stated, inter alia:

> 'If once called seriously into question, the Administration must be able to make at least a minimal showing that the staff member's statutory right was honored in good faith in that the Administration gave the "fullest regard" to it,'

and had ruled, in its Judgement No. 447, Abbas, that the burden of proof of having given consideration was on the Respondent whenever a staff member questioned that such consideration had been given.

72. In the present cases, the Panel found that except for the assertion that the ASG/OHRM was familiar with the qualifications, merit and experience of all his senior staff at the P-5 level and above and had considered all P-5 candidates in OHRM, there was no evidence of any merit that the Appellants had been properly considered. The Panel was 'not given any indication how, where, when and by whom' the Appellants' claims for those particular posts were examined and with what consequence, as specified by the Administrative Tribunal in its Judgement No. 447, Abbas. In the circumstances, doubts persisted that the Appellants had been accorded due process and that, in any event, the required degree of consideration had been given to them.

73. The Panel considered, however, that even if the Appellants had been given full consideration, nothing indicated that [either] of them would have automatically been selected for one of the posts. It was therefore difficult for the Panel to entertain any claim on that account.

...

Recommendation

75. The Panel unanimously recommends that because of that failure the ... Appellants are entitled to compensation. It unanimously agrees to recommend that the amount of compensation for each of those Appellants should be equal to two months' base salary at the time the two posts mentioned in [the Assistant Secretary-General for Human Resources Management's] memorandum of 22 March 1996 had been filled. ..."

On 30 January 1998, the Under-Secretary-General for Management transmitted to the Applicants a copy of the JAB report and informed them as follows:

"The Secretary-General has examined your case in the light of the Board's report. He has taken note of the findings of the Panel that the non-distribution of the vacancy announcements for the posts in issue was not justified by the circumstances and that you did not receive the required degree of consideration for these posts. He has also noted the Panel's statement that, even if you had been given full consideration, nothing indicated that you would have automatically been selected for one of the posts.

The Secretary-General acknowledges the irregularities which occurred in the filling of the posts in issue and has taken note of the Panel's view that compensation should be awarded. He has decided to accept the unanimous recommendation of the Panel regarding compensation and, accordingly, has decided that you receive compensation in the amount of two months' net base salary, calculated as of 25 March 1996, the date the two posts in issue were filled."

On 10 June 1998, the Applicants filed with the Tribunal the application referred to earlier.

Whereas the Applicants' principal contention is:

Although the Respondent has admitted that irregularities occurred in the filling of the posts at issue, he has failed to compensate the Applicants sufficiently, in the light of the seriousness, extent and consequences of those irregularities.

Whereas the Respondent's principal contentions are:

1. The need to fill the two D-1 positions in question on an urgent basis was necessitated by the exigencies of service.

2. The failure to advertise those posts did not prejudice the Applicants' chances for promotion.

3. The Applicants have been adequately compensated for procedural irregularities which occurred in the filling of the posts in issue.

The Tribunal, having deliberated from 1 to 23 July 1999, now pronounces the following judgement:

I. The Applicants Gordon and Pelanne have filed a joint application. Because the two Applicants set forth the same pleas and raise identical issues, namely the filling of two D-1 posts without first circulating vacancy announcements for these posts, the Tribunal orders joinder of the cases.

II. The Applicants maintain that the failure to circulate vacancy announcements "violated their right to be considered fairly and objectively for the posts". They assert that the decision violated the relevant provisions of the Secretary-General's Bulletin ST/SGB/267 of 15 November 1993 and the administrative instruction ST/AI/390, also of 15 November 1993, on Placements and Promotion. The Applicants also point out the irony of the Assistant Secretary-General for Human Resources Management writing in a memorandum dated 21 August 1995, to the Director, Field Administration and Logistics Division, that "Missions are required to ensure the existence of suitable procedures to conduct their internal promotion review in a fair and objective manner", while at the same time committing irregularities in filling the two D-1 posts at Headquarters, in his own department.

III. The Respondent concedes that "[o]f course, the procedures set out in ST/AI/390 on Placement and promotion were not followed ..." The Respondent argues, however, that the irregularities in the filling of the two D-1 posts were due to urgent exigencies of service and that the two posts had to be filled on an expedited basis. The Respondent contends that the procedures followed must be considered within the framework of reorganization of the Department. As the Respondent argues in his answer, "OHRM simply could not afford the unavoidable delay of 4 to 6 months that would have resulted from announcing these two vacancies and following the normal placement and promotion procedures".

IV. The JAB found that the urgency alleged by the Respondent was not of sufficient magnitude to overcome the need to issue a vacancy announcement, in the light of the standard set by the Administrative Tribunal in its Judgement No. 362, Williamson (1986). In Williamson, the Tribunal held that waiver of a vacancy announcement "might be justified in the light of the responsibilities of the Organization under the Charter in an extraordinary emergency situation, for example, a peacekeeping or natural disaster relief operation". The JAB concluded that the "urgent exigencies" allegedly confronting OHRM did not constitute "an extraordinary emergency situation" in accordance with the standard enunciated in Williamson.

V. According to the JAB's findings, the Respondent failed to demonstrate that the Applicants were "duly and fully considered" for promotion for the above-mentioned posts. As the Tribunal has held, the Respondent has the burden of proving that a staff member received consideration for a post or promotion. (Cf. Judgement No. 447, Abbas (1989)). The Tribunal is satisfied that, in the instant case, the Respondent has failed to demonstrate that either of the Applicants was properly considered. The JAB recommended that the Secretary-General pay the Applicants compensation in the amount of two months net base salary. The JAB limited the amount of compensation to that sum, explaining that "nothing indicated that

[either] of them would have automatically been selected for one of the posts."

VI. The Secretary-General accepted the JAB's recommendation and, in a letter to the Applicants, acknowledged the irregularities committed and offered them compensation of two months net base salary, as recommended by the JAB.

VII. The Tribunal agrees with the JAB that the urgency alleged by the Respondent to justify his actions was not so extraordinary in nature that the Administration could avoid the procedures that all staff members are entitled to expect. The Tribunal is satisfied that under the standard established in Williamson, no "extraordinary emergency situation" existed that might have justified the suspension of proper procedures for promotion. The Tribunal is of the view that the Assistant Secretary-General for Human Resources Management could have found other ways of coping with the reorganization of his Department, without having to breach the procedures guaranteeing due process for the Applicants. If, as the Respondent claims, the allegedly "urgent" circumstances could be considered an "extraordinary emergency situation", justifying a departure from the rules, such an excuse could be invoked so frequently that the rules would seldom be followed. Such a result would lead to a complete breakdown of the promotion system, would severely affect career development, and would lead to wholesale favouritism. Consequently, staff morale would suffer, to say the least.

VIII. In light of the serious breach of procedure, the Tribunal finds the amount of compensation recommended by the JAB and accepted by the Respondent to be inadequate. Although the damage suffered by the Applicants is difficult to assess in monetary terms, clearly the Applicants should have been awarded more than two months net base salary for such a flagrant disregard of their rights by the very authority charged with protecting them. The JAB's reason for limiting its recommendation for compensation, that "nothing indicated that [the Applicants] would have automatically been selected for one of the posts" had they

been given full consideration, is unpersuasive. As a result of the improper procedure used by the Respondent, the Applicants were automatically excluded from any opportunity to compete for the posts. The Respondent's disregard of proper procedures was detrimental to the Applicants' career development, and caused the frustation and mental anguish of not being considered for posts for which they might have been qualified. Moreover, the Tribunal cannot take lightly the violation of due process by the Respondent, particularly when ST/AI/390 (superseded in 1996 by ST/AI/413), was enacted by him in order to prevent the very practices to which he resorted in this case. The Tribunal finds that in light of the extraordinary circumstances described above, the Applicants are entitled to a larger amount of compensation than was recommended by the JAB and accepted by the Respondent.

IX. The Tribunal feels compelled to add that this is such a serious case of maladministration that consideration should be given to invoking staff rule 112.3, which provides:

"Financial responsibility

> Any staff member may be required to reimburse the United Nations either partially or in full for any financial loss suffered by the United Nations as a result of the staff member's negligence or of his or her having violated any regulation, rule or administrative instruction."

Thus, the Secretary-General may decide that the officials who violate staff regulations and administrative instructions should be held personally accountable for the monetary damages occasioned by such violations. (Cf. Judgements No. 358, Sherif, para. XIII (1995) and No. 887, Ludvigsen, para. VIII (1998)). Invoking staff rule 112.3 would deter staff from deliberately flouting the rules and prevent the Organization from having to pay for the intentional violation of the rules by its officials.

X. For the foregoing reasons, the Tribunal orders the Respondent:

(i) To pay the Applicant Gordon compensation in the amount of 18 months of her net base salary, at the rate in effect on the date of this judgement; and

(ii) To pay the Applicant Pelanne compensation in the amount of 18 months of his net base salary, at the rate in effect on the date of his separation from service.

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(Signatures)

Hubert THIERRY
President

Julio BARBOZA
Vice-President

Kevin HAUGH
Member

Geneva, 23 July 1999

Maritza STRUYVENBERG
Executive Secretary